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In the Supreme Court of the United States

OCTOBER TERM, 1979

EDWARD PATRICK O'BRIEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ROBERT R. DAVENPORT
Attorney
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 609 F. 2d 895.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1979. The petition for a writ of certiorari was filed on December 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court, while reading a section of the trial transcript to the jury at its request, can exclude a portion of a witness's testimony on the ground that it was improperly admitted in evidence.

2. Whether the trial court properly refused to remove a juror who asked to be excused after the jury had begun its deliberations.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted of interstate transportation of a stolen motor vehicle, in violation of 18 U.S.C. 2312, and conspiracy, in violation of 18 U.S.C. 371. Petitioner was sentenced to a four-year term of imprisonment. The court of appeals affirmed (Pet. App. 1a-8a).

1. The evidence at trial revealed that petitioner was a key figure in a conspiracy to sell stolen cars. Another member of the conspiracy, Edward K. Williams, owned an automobile wrecking yard in Atlantic, Iowa. Williams had a contract with the State of Iowa to haul wrecked automobiles off the interstate highway (Tr. 252). Williams would obtain title to the wrecks (Tr. 190) and tell petitioner in Chicago the make, model and color of each wreck. Petitioner would steal a matching car and transport it across the state line to Iowa. Williams then registered the stolen car with the plates taken from the wrecked car and sold it (Tr. 65).

2. After five and one-half hours of deliberations, the jury was unable to reach a verdict and requested a transcript of the testimony of two government witnesses or, in the alternative, a re-reading of that testimony. Before excusing the jury for the night, the court indicated that it would consider the requests.

The following morning, the court instructed the jury to continue its deliberations without the requested testimony. That afternoon, a juror asked to be removed

because his decision "would not be fair to the U.S. people or the defendant" (Pet. App. 3a). Shortly thereafter, the jury indicated that it was still stalemated. The court then decided to read the testimony requested by the jury, in addition to other testimony that the parties agreed the jury should hear. In reading the testimony of one of the government witnesses, however, the court omitted a portion of the cross-examination on the ground that it should not have been admitted in the first place because it was not proper for the jury to hear (Pet. App. 2a).[1]

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[1]The testimony at issue, with the excised portions italicized, is as follows (Pet. App. 4a-5a n.2):

Q. How many charges could they file against you, a hundred?

A. Probably.

Q. Do you know what the punishment is?

A. Yes.

Q. What did they tell you?

A. Probably put me in jail and put the key away and send my mail to a groundhog.

Q. *Did they tell you that a stolen vehicle in interstate commerce is five years each count*?

A. *Yeah.*

Q. *Could you have gone, technically, to perhaps 500 years in prison*?

A. *Probably.*

Q. Is that motivating you to testify today?

A. That had nothing to do with testifying today.

Q. *How about last week or whenever, the threat of 500 years doesn't bother you*?

A. *No, it doesn't bother me.*

Following the reading of the testimony, which took about three hours, the jury returned to its deliberations. The juror who had asked to be removed inquired through the marshal about a reply to his request, but the court declined to respond (Pet. App. 5a).[2] The jury subsequently returned guilty verdicts on both counts.

ARGUMENT

1. Petitioner contends that it was error for the district court to exclude portions of the cross-examination of a co-conspirator whose testimony was read to the jury.

The trial court properly exercised its discretion in omitting that minor portion of the material it read to the jury. It was excluded because it revealed the maximum penalty for the crime with which petitioner was charged. As the court noted, that penalty was not a proper matter for the jury to consider (Tr. 535-537).[3] Because striking the testimony when it was first given would have been proper, it was equally appropriate for the court to decline to read those portions of the testimony to the jury.

Moreover, the omission did not detract from the effectiveness of the cross-examination in suggesting the witness's motivation for testifying: his potential criminal exposure was emphasized by the re-reading of his

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[2]Although petitioner sought a mistrial because of the juror's reluctance, when the court denied that motion both parties agreed that the inquiry should not be answered (Tr. 558-559).

[3]The imposition of sentence is the function of the judge, not the jury. Informing the jury of the maximum sentence for the crime tends to draw its attention away from its function as adjudicator of the facts. *United States* v. *Wilson*, 506 F. 2d 521, 522 (9th Cir. 1974); *United States* v. *Johnson*, 502 F. 2d 1373, 1377-1378 (7th Cir. 1974), cert. denied, 420 U.S. 977 (1975).

testimony that he knew that as punishment "[the authorities could] put me in jail and put the key away and send my mail to a groundhog" (Tr. 537).

2. Petitioner further contends (Pet. 13) that it was error to ignore the juror's request to be removed after the jury had begun its deliberations.

It is proper for the trial judge to ignore the complaints of a juror. Indeed, it would have been error for the judge to attempt to influence, argue, or discuss the case with a single juror. *United States* v. *Sexton*, 456 F. 2d 961 (5th Cir. 1972); *United States* v. *Smith*, 562 F. 2d 619, 622 (10th Cir. 1977). The court is not required to remove a juror simply because the juror expresses a desire not to continue with deliberations. As stated in *United States* v. *Dozier*, 522 F. 2d 224, 227-228 (2d Cir.), cert. denied, 423 U.S. 1021 (1975):

> While the note indisputably indicates that at the time it was sent the juror in question was reluctant to discharge a juror's duty to vote, it does not necessarily follow that the juror was inattentive at trial or failed to observe or absorb what was said during deliberations. However, we need not speculate as to the juror's processes since it is clear that he or she took the judge's instructions to heart by reaching a decision. Indeed, all twelve jurors so indicated in open court when the jury was polled.

Similarly here, the jury was polled after returning its verdict, and each juror, including the one who had asked to be removed, indicated that he concurred in the verdicts of guilty. Accordingly, the court did not err in refusing to excuse the reluctant juror.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ROBERT R. DAVENPORT
Attorney

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